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Cover Page Footnote

Professor of Law, Harvard Law School. This paper was prepared for Fordham Law School's conference "A New Constitutional Order?," held March 24-25, 2006. I draw on work done jointly with Eric A. Posner, particularly *Accommodating Emergencies*, 56 *Stan. L. Rev.* 605 (2003), and *Terror in the Balance: Security, Liberty and the Courts* (forthcoming 2006). Any errors are mine alone. Thanks to Adam Cox, Daryl Levinson, Martha Minow, and Cass Sunstein for helpful discussion and comments, and to Abigail Moncrieff and Andrea Paul for excellent research assistance.

SELF-DEFEATING PROPOSALS: ACKERMAN ON EMERGENCY POWERS

*Adrian Vermeule**

INTRODUCTION

We do not learn much about emergencies and law by reading Bruce Ackerman's new book on the subject,¹ or so I will suggest. The book is not without value, but its value is not what its author intended. The book stumbles into a methodological pitfall, one that claims many victims, by offering a self-defeating proposal: the diagnosis that Ackerman offers itself rules out the prescription that he suggests. Proposals defeat themselves when the motives, beliefs, or political opportunities ascribed to relevant actors by the theorist's diagnosis are incompatible with the solution that the theorist offers. The value of the book, then, is that it provides a methodological cautionary tale.

Part I offers a brief *précis* of the book and examines its diagnosis of the pathologies of emergency politics. Although my main interest is in the logical connection between Ackerman's premises and conclusions, not in the truth of his premises, I will offer some reasons to think that those premises are wrong or at best overblown, where they are sufficiently specific to be evaluated at all. Part II begins with some general remarks on self-defeating proposals, and then explains that Ackerman's proposals are self-defeating. The motives, beliefs and emotional states, and political constraints that Ackerman describes in the diagnosis also rule out his proposals for a framework statute governing emergencies.

I. DIAGNOSIS

Ackerman argues that Congress should pass an emergency powers statute that authorizes the President to exercise increased powers in the case of

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1. Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (2006).

emergency.² Roughly, and omitting some details, the proposal goes as follows. During the emergency, the executive's power is expanded but hardly unlimited. Ackerman's proposal is not clear in every detail, but he seems to grant the executive the power to detain people without permitting them to challenge the factual basis of their detentions.³ Torture is forbidden; limited rights to hearings remain.⁴ Detainees must be released after forty-five days if the government cannot connect them to the emergency.⁵

To curb executive abuse of power, the framework statute would create a "supermajoritarian escalator" providing that, as time passes, the grant of emergency powers continues only if an increasingly large majority of Congress consents.⁶ At first the executive has the power to declare an emergency, and for a short period—one or two weeks—he has the power to act unilaterally.⁷ At the end of this period, the state of emergency expires unless a majority of Congress votes to sustain it.⁸ After another two or three months pass, the state of emergency expires unless sixty percent of Congress votes to sustain it.⁹ These periodic votes continue with an escalating supermajority requirement topping out at eighty percent.¹⁰ Finally, Ackerman creates various other mechanisms and processes, such as power sharing and information sharing, that are designed to prevent executive abuses.¹¹

Ackerman says that his scheme avoids the undesirable consequences of two alternatives. One alternative is the civil-libertarian view that terrorism is a crime that can be dealt with through the ordinary criminal-justice system, perhaps with relatively modest tweaks like expanded definitions of conspiracy and related offenses.¹² Ackerman thinks that the civil-libertarian view prevents the President from responding forcefully to an emergency.¹³ On the other hand, Ackerman vehemently rejects the idea that the executive branch should be given free rein during emergencies.¹⁴ Excessive deference to the President, in Ackerman's opinion, risks the ratchet-like entrenchment of emergency powers. "It is precisely this rhetoric [of a 'war on terror'] that will encourage courts to rubber-stamp presidential decisions to respond to terrorist attacks with escalating cycles of repression. If the courts don't challenge the language of war, they will

2. *See generally id.*

3. *See id.* at 4-5.

4. *Id.* at 5.

5. *Id.* at 4-5.

6. *Id.* at 4, 80.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *See id.* at 83-87, 90-96.

12. *See generally id.* at 39-57.

13. *See generally id.* at 41-44.

14. *See generally id.* at 19-22.

ultimately acquiesce in the permanent destruction of our liberties.”¹⁵ Ackerman’s proposal allows the President to respond forcefully to an emergency without enabling him to maintain his emergency powers after the emergency ends.

Ackerman provides neither a convincing diagnosis of a political problem during emergencies nor a convincing defense of his proposed remedy. I begin with the diagnosis. Although my chief interest is the relationship between Ackerman’s diagnosis and his prescriptions, the diagnosis itself is both vague and—where it is clear—overblown.

What are the problems for which the framework statute is a solution? Here Ackerman is decidedly vague, offering a potpourri of half-formed suggestions without any theoretical elaboration. We may group the suggestions together as follows:

Panics. After terrorist attacks, people panic; legislators either panic themselves or are politically constrained to behave as though panicky. Panicky lawmakers enact bad legislation, meaning unnecessarily oppressive and liberty-restricting legislation, such as the USA PATRIOT Act.¹⁶ When the emergency has passed regret sets in, but the cycle will repeat itself during the next emergency.

Agency slack and executive despotism. Panic is a problem of systematically skewed cognition, arising from emotional influences. A separate problem is political opportunism. Presidents are only loosely constrained by electoral politics and democratic institutions; they enjoy agency slack vis-à-vis their voter-principals. Presidents use this agency slack to aggrandize themselves, expanding their own power at the expense of legislatures, courts, and other institutions. In emergencies, the executive is given extra leeway; opportunism and the expansion of the security state become all the more likely.

Majoritarian oppression. Perhaps democratic majorities will cause government officials to oppress aliens, dissenters, and outsiders during emergencies. This picture differs from the panic suggestion because it accepts that government officials are rational, albeit self-interested; it differs from the agency-slack suggestion because it accepts that officials act as constrained and therefore faithful agents for democratic majorities or the median voter. On this picture, government chooses security policy rationally, but its goal is to maximize the welfare of current democratic majorities rather than the overall welfare of the polity, and it fails to respect minority rights.

Ratchets. Ackerman often insinuates that emergency policymaking displays a ratchet effect: Increases in security are irreversible or at least costly to reverse, and thus accumulate over time in a “downward cycle.”¹⁷ Government will increase security and decrease liberty during emergencies,

15. *Id.* at 22.

16. *Id.* at 2.

17. *See id.* at 2.

but will never readjust by increasing liberty after the emergency passes, or at least will do so less than it should. In a closely related version, policies that increase security in one domain will spill over into other domains. In either case, the ratchet theory predicts an irreversible trend towards an oppressively authoritarian regime. Thus Ackerman hints darkly of an impending police state: “[President Bush’s] lawyers are building the constitutional foundation for military despotism [The *Padilla* case] opens up the prospect of a legal order worthy of Stalinist Russia.”¹⁸

All of these suggestions are under-specified and unconvincing.¹⁹ They lack theoretically respectable causal mechanisms, ignore offsetting benefits, or rest on evidence that is at best ambiguous, and in some cases clearly cuts against the diagnosis Ackerman offers. Perhaps better mechanisms and evidence could be adduced, but in its current form the diagnosis is merely polemical.

Panics. Ackerman never considers the benefits of fear, even of panic, in individual and collective decisionmaking. Fear can improve decisionmaking as well as hamper it, because fear supplies motivation that can overcome preexisting inertia. In some circumstances fear can even improve cognition by sharpening the assessment of threats that do exist, or by inducing biased reactions that are in fact desirable if the costs of ignoring a real threat are higher than the costs of overreacting to an unreal one. Moreover, panic has no inherent valence in relation to security. Although there are *security panics*, which cause government to supply excessive security, there are also *libertarian panics*, which cause government to supply inadequate security measures. The alarmist rhetorical style of Ackerman’s book, with its breathless warnings of executive tyranny, is symptomatic: Ackerman is a victim of libertarian panic, or else an entrepreneur of libertarian panic who invokes the “phantoms of lost liberty”²⁰ in order to mobilize support for his proposals. In any event, even if the only panics are security panics, there is no class of decisionmakers who can be insulated from panic at acceptable cost, not even judges. Ackerman seems to agree with the last point, occasionally expressing sensible skepticism about the ability of courts to take a stand in favor of civil liberties during emergencies, although we will see that Ackerman reverses his ground on this point when necessary to patch up the argument.

Agency slack and executive despotism. Ackerman largely assumes that executives will abuse their power and become dictators unless a statute such as his constrains them,²¹ but he provides no evidence for thinking that this is true. There are, of course, historical episodes in other countries when executives founded dictatorships by extending indefinitely powers that were

18. *Id.* at 26.

19. For an extended treatment, see the works cited *supra* note *.

20. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 313 (2001) (statement of John Ashcroft, U.S. Att’y Gen.).

21. See, e.g., Ackerman, *supra* note 1, at 6.

granted temporarily. But no such episodes exist in American history, and it is hazardous to assume that what happened in ancient Rome or Weimar Germany will repeat itself in the United States today. Even during emergencies, in the United States the national legislature and the judiciary retain substantial powers; America's federal system would complicate any attempt by a President to draw together all the strings of power; media that are traditionally skeptical of executive power would need to be shut down; a robust civil society—churches, clubs, universities, civic organizations—would need to be squelched. A dictatorship is not a serious possibility in the United States anytime soon. In any event, were dictatorship a real possibility, it is unlikely that a statute such as Ackerman's could prevent it, as I discuss below.

Finally, even if there is a serious risk that an American President would become a dictator as a result of an emergency, one must balance this risk against the gains from granting the emergency powers to the President—namely, the ability to address the threat swiftly and decisively, and without compromising intelligence sources. Ackerman implicitly acknowledges these benefits—that is presumably why he advocates giving the President unilateral emergency power in the first weeks and then thereafter as long as Congress acquiesces. Short of the specter of dictatorship, which gives civil-libertarians a frisson but is not a concern in America in 2006, executive abuses in times of war and emergency are just a cost to be weighed against other benefits. But Ackerman does not provide any detail about the gains side of the ledger.

Majoritarian oppression. Ackerman seemingly assumes that oppression of minorities increases during emergencies.²² But why? The structures of voting and representation that are said to produce majoritarian oppression are the same in both emergencies and normal times. Minorities undoubtedly are scapegoated during emergencies, but they are during normal times as well, albeit in less visible ways. There is little evidence, and no theoretical reason to believe, that majoritarian oppression is on net more likely in emergencies; indeed, minorities often fare especially well during emergencies because government has more need of their contributions. Emergencies are often the engine of progressive change because times of crisis demand good policy.²³

Moreover, majoritarian oppression need not produce excessive security; it can also produce excessive liberty. There exists a form of *libertarian oppression*, analogous to the libertarian panic. Libertarian oppression arises when self-interested majorities cause government to supply political minorities with inadequate protection from third-party threats, such as terrorism. Consider the possibility that government, responding to self-interested voters from “red” states, provides inadequate protection to

22. See, e.g., *id.* at 85.

23. Eric A. Posner & Adrian Vermeule, *Emergencies and Political Change: A Reply to Tushnet*, 56 Stan. L. Rev. 1593, 1594 (2004).

“blue”-state urban centers that are the likeliest targets for terrorist attack, and in this sense supplies excessive liberty in areas where political minorities are concentrated.

Finally, just as the judges are too weak a reed to act as a bulwark against panic, so too the costs of the searching judicial review recommended by the majoritarian-oppression theory increase during emergencies to unacceptable levels. The judges know all this, which is why they defer heavily to government in times of emergency, even with respect to emergency policies that theorists of majoritarian oppression find, in hindsight, to be infected with animus or opportunism. Again, for the most part Ackerman seems to agree that judges are, by and large, systematically incapable of constraining majoritarian politics in times of emergency.²⁴

Ratchets. The ratchet theory fails as well. Ratchet accounts typically lack any mechanism that makes policies spill over into new areas or that makes them stick after the emergency has passed. As others have concluded, notably Geoffrey Stone, there is no evidence for a ratchet-like trend towards an increasingly oppressive security state in American history.²⁵ Those who fear the ratchet’s power point to constitutional trends—such as the rise of executive power—that are more plausibly the result of long-term technological, demographic, and political changes, not caused by recurrent emergencies. As for ratchets and judicial review, it is unclear what judges, who must decide one case at a time, could do about such long-term trends anyway.

There is much more to say about all of these subjects; I have merely tried to map out the major questions. The overall point, however, is that Ackerman’s diagnosis of the ills that afflict emergency policymaking is under-theorized and unclear.

II. PRESCRIPTION

I now turn to the relationship between Ackerman’s diagnosis and prescriptions. Part II.A offers a conceptual map of policy proposals, which (as relevant here) come in two varieties: coherent and self-defeating. Part II.B argues that Ackerman’s proposals are of the latter type.

A. *Self-defeating Proposals*

I will begin with a simple schema for proposals and then explain how a proposal might be self-defeating. In general, let us stipulate that action is a function of agents’ desires, beliefs, and opportunities.²⁶ In place of desires, we might also say motivations or “preferences”; the important conceptual differences between these ideas are immaterial here. Stipulate as well that a

24. See Ackerman, *supra* note 1, at 114.

25. See Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* 530 (2004).

26. Jon Elster, *Introduction to Rational Choice* 1, 4 (Jon Elster ed., 1986).

policy proposal contains both a diagnosis, or a theory-dependent identification of a problem, and a prescription, or a recommendation for action in light of the problem.

On this simple account, a coherent proposal is one whose diagnosis and prescription make compatible assumptions about the desires, beliefs, and opportunities of the relevant agents. A two-year-old child, say, wishes to get a drink of water, is capable of doing so, but erroneously believes that water appears out of thin air rather than from the tap. If I credibly inform him otherwise, my proposal that he obtain water from the tap will be consistent with his desires, (corrected) beliefs, and opportunities. The proposal might still fail on any number of other grounds, of course—the water main might break a moment after the proposal is made—but it will not be internally inconsistent from the inception.

Conversely, a self-defeating proposal is one whose diagnosis and prescription make inconsistent assumptions about agents' desires, beliefs, or opportunities. There are, accordingly, three ways in which a proposal might be self-defeating. First, it might offer a prescription that is motivationally inconsistent with the diagnosis. Given the diagnosis, the actors who have the ability to adopt the prescription have no desire to do so. Second, the proposal might offer a prescription that is cognitively inconsistent with the diagnosis. Given the diagnosis, the actors who have the ability to adopt the prescription will believe that doing so is not in their interests, even if it actually is. Third, the proposal might be inconsistent with the external constraints on relevant agents that are presupposed by the diagnosis. I will offer some brief remarks on each of these.

Motivational inconsistency. This is the most common and perhaps the most familiar form of self-defeating proposal. In normative welfare economics, the problem goes under the rubric of the "determinacy paradox."²⁷ If government is understood as a benevolent maximizer of social welfare, the economist's welfare-maximizing proposals are addressed to the right audience. Suppose, however, that governmental motives are endogenized, and that government officials are modeled as rationally self-interested actors. Then it is not clear that anyone will be listening to the economist's public-spirited proposals; the audience to whom they are addressed will be motivated to adopt them only if they happen to correspond to officials' self-interested aims. "[I]f what governments do is the result somehow of equilibrium behavior of self-interested actors, then advising governments is as senseless an activity as advising monopolists to lower prices or advising the San Andreas fault to be quiet."²⁸

The determinacy paradox is ubiquitous in legal theory, particularly public choice theory, which endogenizes the motivations of government officials at the risk of rendering public-interested proposals fruitless. Consider the

27. Symposium, *Determinacy Paradox*, 9 Econ. & Pol. 205 (1997).

28. Brendan O'Flaherty & Jagdish Bhagwati, *Will Free Trade With Political Science Put Normative Economists Out of Work?*, 9 Econ. & Pol. 207, 207 (1997).

claim, in debates over criminal-justice policy, that the political system invests too little in preventing crime, especially in urban areas:

[T]o the extent that crime victims, or those who live in fear of becoming crime victims, are diffuse and poorly organized, and to the extent that a large part of the population need not share the fear that these victims bear, crime losses may be undervalued by local and state authorities, and are certainly undervalued by federal government officials.²⁹

The resulting proposal is that government should offer publicly funded "crime insurance," the argument being that the obligation to pay out to crime victims will force government to internalize the social costs of crime.³⁰ What is not explained, and is inexplicable given these assumptions, is why the government that is (by hypothesis) not motivated to take full account of the welfare of crime victims would choose to offer crime insurance in the first place.

In examples like this, it is often unclear whether government officials are acting on self-interested motives, or are instead politically constrained to supply self-interested voters with the policies that they demand. In the latter case, the proposal would be self-defeating in light of the external constraints on the actors to whom the proposal is addressed, rather than being directly self-defeating on motivational grounds. Although the distinction is clear at the conceptual level, in operation the two mechanisms generally produce the same results, so we need not worry too much about how to classify particular examples.

Cognitive inconsistency. Suppose that the actor to whom the proposal is addressed is both capable of adopting the proposal and would be motivated to do so, if the actor were thinking clearly. Yet if the impetus for the proposal is that the actor is not thinking clearly, the proposal may be self-defeating. Where various forms of mental illness are at issue, the therapist may propose that the patient take a drug that will suppress the condition. The condition itself, however, often makes the prescription futile; it causes the patient to refuse to take the drug, even though, let us assume, the patient is physically capable of taking it, and doing so would in some sense really be in the patient's interests. (By the latter clause, I mean to bracket the interesting but tangential idea that the patient might face a problem of multiple selves, such that the choice whether to be mentally ill or mentally well might actually be a choice between two different identities.)

The same problem arises in legal theory when the theorist pegs the diagnosis to cognitive biases in the actors to whom the proposal is addressed. Consider the following pastiche of common arguments about risk regulation: "Legislators are constrained to pander to publics who overreact to low-probability risks because of various heuristics and biases. Risk regulation should be entrusted to administrative experts, insulated

29. Saul Levmore & Kyle D. Logue, *Insuring Against Terrorism—and Crime*, 102 Mich. L. Rev. 268, 319 (2003).

30. *Id.* at 313.

from politics, who are not susceptible to these distortions.”³¹ However, the same social phenomena that distort first-order risk regulation by legislatures—herding, availability cascades, and polarization—will also distort second-order legislative decisions about creating, funding, and overseeing expert risk regulators. If a scare about Chilean grapes arises and the expert risk regulators are unmoved, panicky legislators can override the regulators’ decisions through new laws, refuse to fund their operations, or haul them before committees for punitive oversight hearings.³² Under the first option, legislators must overcome the status quo hurdles of the lawmaking process, which insulates the administrators to some extent, but the second and third options do not face this problem.

Political constraints. The theorist may emphasize constraints, rather than motivations or cognition, as determinants of behavior. Officials may be understood as public spirited and having accurate beliefs (at least on average, with no systematic distortions). As mentioned above, however, the same officials, particularly elected ones, may also be tightly constrained by self-interested constituents, and thus forced to behave as though self-interested.

In cases where the diagnosis is that the actor is behaving badly—according to some normative theory—because of political constraints, it is futile and thus self-defeating to urge that the actor simply develop the political will to overcome those constraints. This is the “voluntaristic fallacy,” which arises when the theorist ignores “organizational constraints on individual behavior.”³³ Consider the argument that Congress has, for political reasons, systematically abdicated war-making powers to the President since World War II. Critics of this trend say, on the one hand, that politics forces legislators to do so, and propose, on the other hand, that legislators simply rouse themselves to fulfill their constitutional responsibilities.³⁴ If the diagnosis is correct, the remedy is no more

31. Cf. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 Stan. L. Rev. 683, 685 (1999).

32. See Anne M. Joseph, Called to Account by Separated Powers: Regulatory Activity, Oversight, and Turnover of Agency Leaders 8 (research proposal), available at http://www.law.berkeley.edu/students/curricularprograms/law_econ/pdf/Joseph_Research_Proposal_for_Con_Law_and_Econ_Conference.pdf.

33. Laura E. Garton & Barry Wellman, Social Impacts of Electronic Mail in Organizations: A Review of the Research Literature (Nov. 1993), available at <http://www.dgp.toronto.edu/tp/papers/9313.html>.

34. See John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath (1993). I am simplifying Ely’s position here because he hopes that the courts may prod Congress to act. See *id.* at 54-60. But his central proposal is just that Congress should rouse itself to enact a strengthened version of the War Powers Resolution, see *id.* at 63-66, the same type of suggestion that Ely elsewhere mocks as “a halftime pep-talk imploring [Congress] to pull up its socks and reclaim its rightful authority.” *Id.* at 52. Ely recognizes that political constraints prevent Congress from challenging the executive in times of emergency (even if legislators desire to do so), and he thus expresses the hope that “stepping up and taking responsibility on the question whether to fight a particular war for which the President is beating the drums, and binding oneself in advance and outside any particular context to do so, are at least potentially different matters.” *Id.* at 65. Even apart

sensible than urging a person to jump over a ten-story building by sheer willpower.

A note on ideal and nonideal theory. In many settings, it is sensible to recognize a division of labor: theorists propose, while politics disposes. Perhaps pure theorists should delineate first-best or ideal schemes,³⁵ while legal and political activists attempt to implement them. It might even be best from the systemic point of view if theorists ignore political constraints, thus avoiding a kind of self-censorship that inflicts social harms by filtering out valuable ideas.³⁶

Yet this point does not save proposals that are self-defeating on the grounds described above. These proposals are not merely ideal schemes, that might or might not pass through the political filter. They are already nonideal or second-best schemes designed to cure some extant deviation from the first-best, as when the diagnosis is that ill-motivated governments fail to adopt optimal crime-control policies and the prescription is crime insurance, or when the diagnosis is that panicky legislators adopt bad risk-regulation policies and the prescription is expert risk regulation. The problem with such proposals is that even as nonideal schemes, they are internally inconsistent; there is no saving them by reference to the virtues of ideal theory. In any event, Ackerman does not at all take himself to be offering a (merely) ideal scheme. His ambition is to propose something that might be enacted—which is the main reason he rejects the possibility of casting his proposals as a constitutional amendment, rather than a framework statute.³⁷

B. *The Framework Statute*

With this conceptual map in hand, we may survey Ackerman's proposals.

Motivations. Recall that Ackerman attributes self-interested motivations to the relevant actors. Presidents, enjoying agency slack, seek opportunistically to expand their power. Although Ackerman does not speak as directly about the motivations of legislators, he hints that they defer to the executive for self-interested reasons.³⁸ Perhaps Ackerman's implicit idea is that legislative power is a collective good and will be

from the central problem that Congress has not been able to bind "itself" where war and emergencies are concerned, as I suggest below, there is a further problem: the very same abstraction from context on which Ely relies to loosen the political constraints also saps legislators' motivation to take any action, given the opportunity cost of foregoing other projects with concrete short-term payoffs. The War Powers Resolution might be depicted as the rare moment of Ackermanian higher lawmaking in which legislators overcame this motivational deficit, but feasible proposals should not count upon the repetition of an exceptional event. I expand upon this dilemma below.

35. I use "first-best" and "ideal" as rough synonyms, although the former is an economic concept, the latter a philosophical one; the imprecision is not harmful for present purposes.

36. See Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 Minn. L. Rev. 1154, 1172 (2006).

37. See Ackerman, *supra* note 1, at 123.

38. See *id.* at 18-19.

undersupplied by the collective action of self-regarding individual legislators.³⁹

What this means is that even accepting all of Ackerman's premises, the very motivations his diagnosis ascribes to the relevant actors will defeat his proposals for reform. Begin with legislators. It is quite predictable, given Ackerman's premises, that legislators will use his framework statute as a pretext for deferring to bad executive actions. They might acquiesce in the measures advocated by the executive on the grounds that executive power will expire shortly, and so they might agree to worse abuses than they would if Ackerman's statute did not exist, and the legislators confronted the problem of expiration directly. The supermajoritarian escalator is an exotic species in the genus of sunset provisions; and sunset provisions reduce legislators' *ex ante* incentives to act responsibly, all else equal, because the costs of acting irresponsibly at any given time are lower than would otherwise be the case.⁴⁰ Ackerman has not taken adequate account of the fact that the framework statute, if enacted, will be common knowledge to all participants, who will anticipate its effects and adjust their behavior accordingly.

The motivations that Ackerman attributes to the executive will also undermine his scheme. Recall that Ackerman pictures an executive who seeks not only to expand his power, but also to do so through steps that are irreversible or costly to reverse—the ratchet effect. Given these motivations, the framework statute encourages the President to act opportunistically to expand his power as quickly as possible, in the first period of the emergency when his political freedom or power is at a maximum under Ackerman's scheme, rather than risk waiting until a point where a supermajority no longer extends the state of emergency. If there are executive actions that can be taken during emergencies and are costly to reverse afterwards—a premise that I have questioned but that Ackerman accepts—then Ackerman's scheme gives the President every incentive to carry them out as soon as possible, before the legal hurdles escalate.

Ackerman assumes the contrary, saying that “[t]he president knows that he will have a tough time sustaining supermajorities in the future, and this will lead him to use his powers cautiously. The public will bridle if his underlings run amok, acting in arbitrary ways that go beyond the needs of the situation.”⁴¹ For “cautiously,” however, one should substitute “aggressively,” given Ackerman's views about executive motivations. The passing suggestion that political constraints rule out presidential aggression is inconsistent with everything else Ackerman says; if it is true, then the President does not enjoy as much agency slack as Ackerman supposes, and there is no need for the framework statute to tie the President down in the

39. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 Harv. L. Rev. 915, 950-60 (2005).

40. See Jacob E. Gersen, *Temporary Legislation*, U. Chi. L. Rev. (forthcoming 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=911603.

41. Ackerman, *supra* note 1, at 81.

first place. This is not a logical disproof, to be sure; it is just possible that agency slack could be great enough to permit the President to take small steps towards self-aggrandizement, but not so great as to allow him to move aggressively. But it would be quite fortuitous if the values of variables like agency slack happened to fall right in the narrow band necessary to make Ackerman's proposal coherent; and Ackerman gives us no reason to think that they do.

And given Ackerman's premises, presidential declarations of emergency would be pretextual in any event. Ackerman seemingly gives the President absolute authority to declare the start of the emergency, even if only for a week or two, and it is clear that judges will have no real choice but to defer to the emergency declaration even if it is arguably pretextual. That has been the experience under the National Emergencies Act⁴² and the International Economic Emergency Powers Act.⁴³ Under the latter statute, a court said that the President had unreviewable discretion to determine that the government of Nicaragua satisfied the statutory requirement of "an unusual and extraordinary threat,"⁴⁴ while under the former statute "anything the President says is a national emergency is a national emergency."⁴⁵ Given the opportunistic and power-maximizing executive that Ackerman supposes, and the supine posture of the courts, bad-faith declarations of emergency are inevitable.

Ackerman is aware of this Achilles' heel in his framework and tries to armor it with a proviso: The state of emergency may only be triggered by an actual attack, not a showing that emergency powers are necessary to preempt an imminent attack—the theory being that a declaration of emergency in advance of an actual attack, based on a finding of "clear and present danger," would leave too much scope for manipulation and pretext.⁴⁶ This might solve the problem, but at far too high a price. Consider that the law of self-defense, both for individuals and for states, always allows aggressive action not only in response to an actual attack, but to preempt an imminent threat.⁴⁷ Is Ackerman seriously suggesting that a President must wait until an attack has occurred and lives are lost in order to take extraordinary measures? If so, then the impulse to minimize the risk of executive opportunism has become an *idée fixe* that is crowding out all other considerations.

Lord Hoffman stated in the House of Lords—before the July 7, 2005 terrorist attacks in London—that "[t]he real threat to the life of the

42. 50 U.S.C. §§ 1601–1651 (2000).

43. 50 U.S.C. §§ 1701–1707 (2000).

44. *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191, 1192 (D. Mass. 1986), *aff'd*, 814 F.2d 1 (1st Cir. 1987).

45. Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability*, 52 S. Cal. L. Rev. 1453, 1458 & n.27 (1979).

46. Ackerman, *supra* note 1, at 91.

47. See John Yoo, *Using Force*, 71 U. Chi. L. Rev. 729, 735 (2004).

nation . . . comes not from terrorism but from [invalid] laws”⁴⁸ Ackerman, going Lord Hoffman one better, seems to be saying that a threat to the lives of the actual people who make up the nation’s citizenry is to be discounted until an attack has already occurred. Even after the attack, Ackerman says that “September 11, to my mind, represents the low end for the legitimate imposition of a state of emergency.”⁴⁹ This implies, and the surrounding discussion confirms,⁵⁰ that an attack resulting in, say, a mere 2000 deaths would not suffice. Here, as elsewhere, Ackerman is obsessed with minimizing executive abuses to zero, no matter what the collateral costs. Executive abuses should be optimized, not minimized; they are an inevitable by-product of the optimal security regime and should be weighed against the offsetting benefits, such as saving people’s lives.

Cognition and emotion. Ackerman’s statute is also a poorly designed cure for the cognitive distortions, arising from emotional influences, that he diagnoses.⁵¹ If his framework statute is needed to prevent panicking legislators from deferring to bad executive actions, then it seems unlikely that it can have that effect. A panicky Congress can simply ignore the supermajoritarian escalator and approve new statutory powers or a new statutory framework by majority rule; the PATRIOT Act, which Ackerman abhors,⁵² could have simply included one panicky section sweeping away any extant framework statutes limiting presidential power. The public does not usually choose officials on the basis of their ability to stay calm during emergencies. There are too many other relevant considerations. Most politicians are elected on the basis of their ability to deliver the goods during ordinary times. Although sometimes a politician’s background contains indications of emotional discipline, the latter is not a salient issue in political contests.

Again, we may if we like put this point in terms of political constraints. It is questionable whether elected officials can resist political pressures when citizens panic. Below, I adduce some evidence that precommitments are especially likely to come undone during national-security emergencies, whatever their binding power in normal times. During a national emergency, a government that dismisses citizens’ fears as irrational may inflame rather than quell those fears. If the public firmly believes that a threat exists, official assurances to the contrary do no good; instead, it is evidence to the public that the government is unprepared and insufficiently

48. *A and others v. Sec. of State for the Home Dep’t*, [2004] UKHL 56, [2005] 2 A.C. 68, 132.

49. Ackerman, *supra* note 1, at 92.

50. *Id.*

51. Ackerman seems to assume throughout that fear is an emotional influence that distorts cognition. I will adopt this assumption, bracketing two other possibilities: (1) Fear is an emotional influence that improves cognition; (2) emotions themselves necessarily subsume cognitive judgments. On these issues, see generally Jon Elster, *Alchemies of the Mind: Rationality and the Emotions* (1999); Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2001).

52. See Ackerman, *supra* note 1, at 2.

vigorous. Waving the Constitution at the public will not help when the public believes that the Constitution itself is being threatened; much less will a mere framework statute provide a barrier against widespread panic.

Cognition, information, and uncertainty. Let us focus briefly on the role of information costs and uncertainty in Ackerman's prescriptions. Even where cognition is undistorted, in the sense that officials' estimates show no systematic biases and are accurate on average, information is still costly, and the uncertain character of policymaking is especially serious during emergencies. Consider the role of uncertainty at two points: just after an attack occurs and when legislators are considering enacting Ackerman's framework statute in advance of a future attack. In the first situation, Ackerman argues that "the arts of risk management are radically inappropriate in the aftermath of a terrorist attack. . . . [W]e are suddenly thrown into a world of unknowable uncertainty, not calculable risk."⁵³ Ackerman's remedy for this is "reassurance" through granting the state extraordinary powers for a brief period, followed by a rapid return to normalcy through the supermajoritarian escalator.

The sensible response to genuine uncertainty, however, is the maximin principle, which says that decisionmakers should choose the course of action with the highest minimum payoff, the best worst-case scenario. Maximin is why governments take draconian measures after a surprise attack, and given Ackerman's premises, the maximin strategy should be pursued as long as the uncertainty lasts. Ackerman's proposal for a rapid return to normalcy supposes that the government's and the public's responses are driven by emotion-driven panic, which decays over time. But if there is genuine uncertainty, maximin need not be a symptom of panic; it is as rational a response as uncertainty permits.⁵⁴ Ackerman is confused about this; he invokes uncertainty and yet also warns that "[it] will be tempting for the executive to respond by focusing on a few worst-case scenarios without seriously considering whether other greater dangers exist."⁵⁵ If responding to those other "greater dangers" produces a greater minimum payoff, then a rational executive pursuing maximin will do so. What is true is that, as Judge Posner says,

[w]hen a nation is attacked, there is at first great uncertainty about the gravity of the attack, so naturally and sensibly the government responds with severe measures. The longer the struggle initiated by the attack continues, the more accurate the assessment of danger becomes, and so it becomes possible to scale back the repressive measures⁵⁶

53. *Id.* at 45.

54. Other strategies may be pursued under uncertainty, see R. Duncan Luce & Howard Raiffa, *Games and Decisions: Introduction and Critical Survey* 278-86 (1957), but maximin is not inferior to them and is the most common.

55. See Ackerman, *supra* note 1, at 86.

56. Richard A. Posner, *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11*, at 188-89 (2005).

The government will itself loosen its grip as its information improves, not as the result of an externally imposed and artificial framework.

In the second situation, where legislators are considering a framework statute to regulate future emergencies, Ackerman overlooks the sheer cognitive load imposed by the *ex ante* approach, given the high costs of information about the future—an especially serious consideration where emergencies and national security are at issue. The framework statute relies on elaborate procedures to deal with events that by their nature are unpredictable, fluid, and therefore unlikely to play out according to conceptions held years in advance. An instructive contrast is provided by the various emergency provisions in foreign constitutions, which are by and large extremely vague⁵⁷—hardly clearer than the common law pattern of judicial deference during emergencies that has dominated in the United States. This convergence on vague standards rather than specific rules probably reflects an international consensus that emergency powers cannot be sensibly determined in advance because the requirements of future emergencies are so difficult to predict. It is better to provide that the executive may exercise emergency powers, and then allow the political system, judges included, to come to a consensus about their appropriate scope once the emergency begins.

Ackerman recommends that we might “[s]imply recalibrate the speed of the supermajoritarian escalator—changing the extension periods from two to three months, say, thereby slowing the rate of ascent to the supermajoritarian heights.”⁵⁸ If the recalibration is meant to occur long before the emergency, when the framework statute is being enacted, there is no basis for doing so; legislators are behind too thick a veil of uncertainty to know what will work during the next emergency, whose shape and consequences will be unpredictable. The advantage of the veil of uncertainty is that it promotes impartiality; its disadvantages are that it suppresses information and diminishes the political motivation to act at all, because self-interested political actors will substitute projects that more clearly benefit themselves.⁵⁹ Where emergencies, war, and threats to national security are at issue, the latter effects are more likely and more costly than in other policy domains.

Perhaps, however, the recalibration is meant to occur during or after the emergency—which is, after all, when new information about the costs and benefits of the framework statute will become available. But this just emphasizes that the framework statute is no constraint on emergency

57. See Eur. Comm’n for Democracy Through Law, *Emergency Powers* (1995) (overview of emergency-powers provisions). Ackerman goes as far afield as South Africa to find a constitutional model for his supermajoritarian escalator, see Ackerman, *supra* note 1, at 89-90, but South Africa is not comparable to the United States on many or any of the political, economic, or strategic dimensions relevant to the law of emergency powers.

58. Ackerman, *supra* note 1, at 115.

59. Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L.J. 399, 399-402 (2001).

decisionmaking. The tinkering will, on Ackerman's premises, occur under conditions of public panic and executive opportunism. On that picture, we might expect to see an "extension" of emergency powers not from two months to three, but from two months to three years, or—more probably—the outright repeal of the framework statute itself once the need for modification is acknowledged.

There is a dilemma here arising from the interaction among cognitive and motivational problems, information costs, and the timing of framework enactments. On the one hand, framework legislation enacted after the emergency has come to pass is likely to suffer from the motivational and cognitive distortions that Ackerman fears. On the other hand, legislators are unlikely to enact a framework statute to regulate emergencies in the hazy future. Although in such a position legislators would act impartially, behind a veil of uncertainty that suppresses knowledge of the statute's short-run political payoffs, that very uncertainty saps legislators' motivation to act, and thus makes it less likely that any legislation will be enacted in the first place.⁶⁰ The high opportunity costs of political action, constricted agenda space in Congress, the horizon of reelection, and the tendency to discount the future all push legislators to rank projects by the amount of benefit they produce in the near term. Projects that will produce large collective benefits in the long run, but whose distributive valence is uncertain, will generally be subordinated to projects that produce larger factional benefits in the short run. Legislating for the remote future replaces self-interested motivation with impartial reason, but impartial motives are often too weak to produce action. To be sure, sometimes framework statutes slip between these two opposing forces in moments of "higher lawmaking," but these are rare events. A proposal that must count on the occurrence of the improbable is itself implausible.

Political constraints. Ackerman's framework statute is supposed to perform a constitutional function. It reorganizes governmental powers during an emergency, and then ensures that they return to normal after the emergency expires. A statute could, in principle, perform such constitutional functions by aligning the various parties' expectations about the future, which then provide a basis for objecting to usurpations or interference when the emergency occurs. However, history shows that statutory limitations are weak during emergencies. The War Powers Resolution, which limited the circumstances under which the President could use military force and imposed various reporting requirements when the President did use force, has been ignored. As I mentioned above, the National Emergencies Act similarly imposed restrictions and reporting requirements on the President's power to declare emergencies, and the International Emergency Economic Powers Act limited the President's power to impose economic sanctions during emergencies. None of these

60. *Id.*

statutes has had much of an impact on the behavior of executives.⁶¹ Finally, after 9/11 the President undertook a program of domestic warrantless surveillance, one that in the view of many commentators clearly violates the Foreign Intelligence Surveillance Act.⁶² Public opinion, however, is divided about the program's legality.⁶³ As of this writing, there seems little prospect that Congress will retaliate; the most likely outcome is some sort of legislative ratification of the program, which means that the President will have effectively annulled the Foreign Intelligence Surveillance Act as well as the other framework statutes governing executive action in emergencies.

The reason for the failure of statutory frameworks is plain. When an emergency or war or crisis arises, the executive needs flexibility; because statutory limitations determined in advance can only reduce flexibility, and do so in a way that does not anticipate the particular requirements of a new emergency, no one has any *ex post* interest in insisting that these limitations be respected. Ackerman acknowledges the grim historical record but provides no valid reason for thinking that his framework statute—which is far more ambitious than the other ones—might fare differently.

Ackerman says that his framework statute arranges the status quo differently than does the National Emergencies Act, and that this makes all the difference.⁶⁴ Under the latter, Congress must take affirmative action to override a presidential declaration of emergencies, whereas under Ackerman's proposal the President's emergency powers will lapse automatically unless Congress votes to extend the emergency.⁶⁵ But this is to confuse the legal status quo with the factual status quo; the latter is set by presidential action on the ground, whatever the law may say. The War Powers Resolution, which Ackerman barely mentions, sets the status quo in the same way that his framework statute would, by requiring the President to obtain congressional approval for deployments of U.S. forces after the initial sixty-day period has passed. And the War Powers Resolution is utterly defunct, as shown by President Clinton's clear violation of the Act during the Kosovo conflict, a seventy-eight-day military campaign conducted without congressional authorization.⁶⁶ As Kosovo reveals, the President's central power is to move first, in the world beyond the statute books, and thus confront Congress with a *fait accompli*.⁶⁷ The ill-motivated

61. See Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 Yale L.J. 1385, 1412-21 (1989).

62. See Beth Nolan et al., *On NSA Spying: A Letter to Congress*, N.Y. Rev. of Books, Feb. 9, 2006, available at <http://www.nybooks.com/articles/18650>.

63. See Jeffrey M. Jones, *Public Remains Divided About Wiretapping Controversy*, Gallup Poll, Feb. 16, 2006, <http://galluppoll.com/content/?ci=21499>.

64. See Ackerman, *supra* note 1, at 123.

65. See *id.* at 4.

66. Major Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 Wm. & Mary L. Rev. 1149, 1154, 1182 (2001).

67. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. Econ. & Org. 132 (1999).

President that Ackerman pictures will do just that, and the politically constrained Congress that history reveals will be both unwilling and largely powerless to do anything about it, however the legal status quo is nominally set.

One can always throw on sandbags to shore up an argument. Perhaps the War Powers Resolution involves foreign affairs, where there are fewer salient victims of presidential law-violation to spur congressional reaction, while violations of Ackerman's framework statute would produce politically consequential victims.⁶⁸ But in the setting of a domestic emergency, the persons the President can claim to be protecting, or avenging, will be more salient and politically important as well; consider the political effect of images of the 9/11 victims. And violations of some statutes, such as the Foreign Intelligence Surveillance Act, may never produce salient victims at all, if it is unclear whom the government has surveilled. Accounts of this sort are inherently speculative and ambiguous, in part because the underlying mechanisms of political psychology are as yet poorly understood.

Emergencies and time-inconsistency. The general problem with Ackerman's proposal, which runs throughout the foregoing points, is that of the time-inconsistency of emergency policymaking, or the demonstrated inability of Congress to effectively bind future Congresses where emergencies and war are concerned.⁶⁹ The point here is not that framework statutes enacted at one time never constrain legislators or other actors at a later time. It is that they are least likely to constrain in the settings Ackerman is discussing and given the conditions he diagnoses. Where emergencies provoke panic, unleash socially harmful motivations, and encourage legislators to defer to executive power, earlier framework legislation is most likely to be circumvented or repealed outright. Given Ackerman's premises about motivations, cognition, and political constraints, the framework statute will become a dead letter, as have the War Powers Resolution and the National Emergencies Act. Once the emergency begins, there is no way to force Congress to abide by the supermajoritarian escalator, and there is no prospect that Congress will retaliate against the executive for violating the framework. Nor will courts do any better, in all likelihood. In principle, courts could refuse to defer to executive action undertaken if the relevant supermajority rule is not obeyed, but in practice courts tend to obey subsequent majorities that ignore supermajority rules—and as Ackerman intermittently acknowledges, judicial deference is especially likely during an emergency.

68. Conversation with Professor Bruce Ackerman, Sterling Professor of Law and Political Science, Yale University, at the Fordham Law Review Symposium "A New Constitutional Order?" (March 24-25, 2006).

69. For skepticism about the constraining force of legal precommitments during subsequent emergencies, see Martha Minow, *What is the Greatest Evil?*, 118 Harv. L. Rev. 2134, 2166-67 (2005) (reviewing Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (2004)).

It is odd that Ackerman simultaneously (1) denies that Congress can enact an entrenched statute that binds future Congresses;⁷⁰ (2) acknowledges that he needs a stronger commitment mechanism than an ordinary, non-entrenched statute;⁷¹ but (3) refuses to cast his proposal as a call for constitutional amendment. What's left? Aware of this problem, Ackerman partly retraces his steps, amending his concession that courts are ineffective guardians of civil liberties during emergencies. Should a panicky Congress repeal the framework statute, Ackerman suggests, courts can act as "guardians of the emergency constitution,"⁷² denying Congress the authority to suspend habeas corpus or adopt other strong measures unless and until a supermajoritarian escalator is restored. So the suggestion is that the escalator should be deemed constitutionally required, not just permissible, and by judicial declaration made in the midst of an emergency and resting on no discernible constitutional text, precedent, or other conventional legal materials. Courts have rarely, if ever, summoned this sort of political courage in the face of joint action by Congress and the executive during emergencies;⁷³ and if courts could be so bold, then they could just enforce constitutional civil liberties directly, and there would be no need for a detour through an elaborate framework statute.

CONCLUSION

The framework approach is infeasible or even counterproductive, given Ackerman's premises about the motivations of legislators and the executive, their political psychology, and the constraints on legislators' behavior. The proposal to promulgate an "emergency constitution"⁷⁴ through a framework statute is self-defeating—a warning to theorists who fail to calibrate diagnosis with remedy.

70. Compare Ackerman, *supra* note 1, at 166-67, with Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1686-87 (2002). On this view, there is no constitutional barrier to entrenching legislation; but entrenched rules are especially likely to be circumvented or violated where emergencies subsequently arise.

71. Ackerman, *supra* note 1, at 104, 134 (acknowledging that the framework statute could be overridden or repealed by simple majority, thereby undermining the effectiveness of the supermajoritarian escalator).

72. *Id.* at 105 (emphasis omitted).

73. See generally William H. Rehnquist, *All The Laws But One: Civil Liberties in Wartime* (1998); Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (1948); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 Harv. L. Rev. 2673, 2679 (2005); Christina E. Wells & Jennifer K. Robbennolt, *Foreword to Interdisciplinary Perspectives on Fear and Risk Perception in Times of Democratic Crisis*, 69 Mo. L. Rev. 897 (2004); John C. Yoo, *Judicial Review and the War on Terrorism*, 72 Geo. Wash. L. Rev. 427 (2003).

74. Ackerman, *supra* note 1, at 3.

Notes & Observations